

These FAQ's cover:

- 1) Presuit notice and settlement conference notice questions for mortgage foreclosure cases filed July 1, 2009, or later, and
- 2) Post-filing questions.

Pre-Suit Notices

Q: What are the court's options if the plaintiff lender fails to provide the defendant debtor with the required pre-suit notice?

A: The court may: (1) refuse to accept the complaint for filing; (2) accept a voluntary dismissal of the case in accordance with Trial Rule 41(A); or (3) dismiss the action pursuant to Trial Rule 12.

Q: How may plaintiff lenders serve the pre-suit notice on defendant debtors?

A: The statute requires that the pre-suit notice be sent to the debtor via certified mail, return receipt requested.

Settlement Conference Notices (cases filed on or after July 1, 2009)

Q: Must the settlement conference notice be served via certified mail?

A: The statute is silent with respect to the method of serving the notice to defendant debtors. Accordingly, referring to Trial Rule 5, depositing the notice in the US mail addressed to the defendant debtor with postage prepaid, would be sufficient to deem service completed.

Q: Is the settlement conference notice required in all mortgage foreclosure cases?

A: No. The settlement conference notice is required in foreclosure cases where a first mortgage or a land contract that constitutes a first lien is created or retained against a defendant debtor's primary residence. Defendant debtor must be living at this residence at the time of the foreclosure filing.

Q: If the plaintiff lender fails to serve the settlement conference notice with the complaint, how can the court proceed?

A: The court may (1) stay the proceeding and order the plaintiff lender to send the notice before continuing the action, (2) accept a voluntary dismissal of the case in accordance with Trial Rule 41(A); or (3) dismiss the action pursuant to Trial Rule 12.

Post-Filing Issues

Q: If a defendant debtor requests a settlement conference, can the court order the parties to mediation?

A: Yes. Like any civil matter, a judge can order parties to mediation and order how the mediator fees are to be paid, unless payment has otherwise been agreed upon by the parties. *See* A.D.R. Rules 2.2 and 2.6.

Q: Do all defendant debtors have the right to a settlement conference?

A: No. A settlement conference is not required if there are bankruptcy proceedings pending, the home securing the loan is not the defendant debtor's primary residence, or the defendant debtor is not currently occupying the home.

A settlement conference is also not required if the court determines that:

1. the loan has been subject to a prior modification and the defendant debtor has defaulted under the terms of the modification, or
2. a settlement conference would be of limited value based on the result of a prior loss mitigation effort between the plaintiff lender and defendant debtor.

Q: If the parties do not bring the required documents to the settlement conference, or a party fails to appear or participate in a settlement conference, can the court reschedule the settlement conference and order a party to appear or participate?

A: Yes. IC 32-30-10.5-10(b) provides that the court may require any person that is a party to the foreclosure action to appear at or participate in a settlement conference. Furthermore, for cause shown, the court may order the parties to reconvene a settlement conference at any time before judgment is entered.

Q: Can a senior judge preside over a settlement conference?

A: Yes. A senior judge can preside over a settlement conference so long as the judge in the court the senior judge is appointed to serve has jurisdiction to preside over settlement conferences. Senior judges may also receive payment under the Senior Judge Statute for senior judge services with respect to settlement conferences.

For counties participating in the Mortgage Foreclosure Trial Court Assistance Project (MFTCAP), senior judges not being compensated under the Senior Judge statute are permitted to serve as facilitators and receive payment from STAD for such service (currently the rate is approximately \$50 per settlement conference held). However, a senior judge being compensated under the MFTCAP would not receive "credit" toward the required 30 days, nor would time served be counted against the senior judge's court.

Q: Who is a proper party to commence a foreclosure action involving a promissory note and mortgage?

A: IC 26-1-3.1-301 defines a "person entitled to enforce" an instrument (note) as follows: "(1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a

holder; or (3) a person not in possession of the instrument who is entitled to enforce the instrument under IC 26-1-3.1-309....”

- (i) A person is a holder if he/she is in possession of the note that is specifically endorsed to that person or if the note is given to that person and is endorsed in blank. *See* IC 26-1-3.1-201(a) and IC 26-1-3.1-109(a)(2).
- (ii) A person can become a transferee and therefore entitled to enforce the instrument without obtaining an endorsement of the note. *See* IC 26-1-3.1-203.
- (iii) A person who has lost an instrument may be entitled to enforce the instrument. *See* IC 26-1-3.1-309.

Q: May the court determine whether the plaintiff lender has proper standing or is the party-in-interest to commence the mortgage foreclosure proceeding? If so, how may the court proceed if the plaintiff lender lacks standing or is not a party-in-interest?

A: Yes, the court may *sua sponte* determine whether a plaintiff lender commencing the mortgage foreclosure proceeding has proper standing and/or is the party-in-interest and if not, enter a judgment on the pleadings in accordance with Trial Rule 12(D) or dismiss the action pursuant to Trial Rule 41(E).

Q: May a court take action on a mortgage foreclosure after 30 days have elapsed from the date the notice of settlement conference was sent to defendant debtor when the defendant debtor has not requested a hearing?

A: Yes. If the plaintiff lender timely sent the defendant debtor the pre-suit and settlement conference notices and the defendant debtor has not requested a settlement conference within the 30-day period of the complaint being served, the court may take action on the foreclosure case. *See* IC 32-30-10.5-9.

Q: Is a mortgage foreclosure impacted by bankruptcy proceedings involving the defendant debtor?

A: Yes. The mortgage foreclosure proceeding must be stayed pending notification that the Bankruptcy Court has lifted the stay in the bankruptcy proceeding.

Q: Is a defendant debtor entitled to a jury trial in a mortgage foreclosure case following a proper demand for a jury under Trial Rule 38?

A: Maybe. Generally, issues of equity are tried by the court and issues of law may be tried by the jury. Trial judges must evaluate the nature of the underlying substantive claim and look beyond the label a party affixes to the action and the subsidiary issues that may arise within such claims. They must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded in order to enter findings as to whether equity takes jurisdiction of the essential features of a suit and which counts of the complaint might be properly severable for jury trial purposes.

In *Songer*, the Indiana Supreme Court determined that forgery, conversion, and fraud affirmative defenses to complaint to liquidate collateral did not entitle debtor to a jury trial. *Songer v. Civitas Bank*, 771 N.E.2d 61 (Ind. 2002). Furthermore, in *Morris*, the Indiana Court of Appeals determined that a fraud counterclaim to complaint for mortgage foreclosure did not entitle debtor to a jury trial. *Morris v. Bank One Indiana, N.A.*, 789 N.E.2d 68 (Ind. Ct. App. 2003). It remains unclear in Indiana whether other counterclaims, such as breach of contract and violations of RESPA and TILA, will result in severance of the legal claims or whether equity will take jurisdiction over all of the claims.

Q: Are judges permitted to stay foreclosure proceedings when a settlement conference is requested?

A: Yes. Although the statute is silent on this point, the authors of the legislation believed that a judge would automatically stay a proceeding once a settlement conference had been requested. This issue was raised only after some judges stated that they did not feel they had the discretion to levy a stay on a foreclosure case that was in negotiations.

Q: May judges impose sanctions on plaintiffs who do not abide by the guidelines set forth in IC 32-30-10.5 *et seq.*?

A: Yes. Several judges involved with the MFTCAP have taken the initiative to impose sanctions on lenders who violate one or more provisions of IC 32-30-10.5 *et seq.*, most generally failing to send to the settlement conference an individual with settlement authority. Again, the statute is silent on this point, but the Supreme Court has told trial court judges that the parties in mortgage foreclosure cases are subject to the same sanctions as any other litigant who flouts the statute or court rules.

Q: May sanctions assessed against a plaintiff for failure to abide by a settlement conference requirement be used to support the Court's foreclosure-prevention efforts?

A: It depends on two factors: 1) whether the sanction is considered a criminal contempt "punishment" (if so, the fines would have to go to the Common School Fund); and 2) whether the sanction was a civil contempt measure to coerce the plaintiff's compliance, rather than a monetary sanction based on out-of-pocket losses experienced by the defendant. If the sanctions are in fact **not** intended to compensate the defendants losses, but rather to compel the plaintiff to comply with settlement conference orders, trial court judges have discretion to order that these sanctions be paid to the state's Mortgage Foreclosure Fund.